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Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 61

BEST & COMPANY, INC.,
Appellant,

vs.

A. J. MAXWELL, Commissioner of Revenue of the State of North Carolina.

Appeal From the Supreme Court of the State of North Carolina.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION, AND BRIEF OPPOSING APPELLEE'S MOTIONS TO DISMISS AND TO STRIKE FROM THE RECORD.

LORENZ REICH, JR.,
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Counsel for Appellant.

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OCTOBER TERM, 1939

No. 961

BEST & COMPANY, INC.,

Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION, AND BRIEF OPPOSING APPELLEE'S MOTIONS TO DISMISS AND TO STRIKE FROM THE RECORD.

In the statement opposing jurisdiction and motion to dismiss, the appellee, contending that no substantial federal question is involved, presents the following arguments:

1. That the Supreme Court of the State of North Carolina had the right to construe a taxing statute of that State, and that its construction thereof is binding upon this Court;

2. That the said statute as construed by the Supreme Court of North Carolina does not violate the Commerce Clause of the Constitution of the United States; and

3. That the said statute does not violate Section 2 of Article IV of, or Section 1 of the Fourteenth Amendment to, the Constitution of the United States.[1]

[1] The appellant does not challenge the statute as abridging its privileges and immunities under either provision.

The appellee has also moved to strike from the record the license issued to the appellant by the appellee as Commissioner of Revenue, on the ground that the license was not introduced in evidence and is not part of the record below.

The statement opposing jurisdiction is not confined to matters or grounds making against the jurisdiction of this Court asserted by the appellant, but dwells considerably upon the merits of the issues raised by the appeal.

Consistently with the rules of this Court, we shall consider herein primarily the question of jurisdiction and shall advert to the merits only so far as necessary to show that a motion to dismiss does not properly lie.

The Issue.

It is undisputed that the appellant's activities in North Carolina are solely directed at the solicitation of orders for the purchase of goods to be shipped interstate, and that only interstate sales actually result therefrom.

The statute challenged exacts a fixed-sum tax (described in the statute as a "privilege tax") as a condition to the transaction of such business.

It provides that any one not a regular retail merchant in the State, who displays samples of goods in a hotel room (or temporarily rented or occupied house) for the purpose of securing orders for the retail sale of such goods so displayed, shall procure a State license for the privilege of displaying such samples and shall pay an annual privilege tax therefor. The license entitles the merchant to conduct the display.

It is conceded that the appellant, a New York corporation, having no place of business or agent in North Carolina and not domesticated there, displayed for a few days in a hotel room in Winston-Salem, North Carolina, samples of its merchandise for the purpose of obtaining orders for the retail sale of similar goods for future shipment in interstate commerce; that no merchandise was sold or delivered and none was offered or available for that purpose; that the orders

taken were all forwarded to and were subject to acceptance at the appellant's New York office; that the orders accepted were filled by interstate shipment from New York direct to the customers in North Carolina; that no money was collected at the time of the display and that all payments for the merchandise were made by the customers direct to the appellant's New York office.

Tax was exacted from the appellant under the said statute and was paid by the appellant involuntarily and under protest, on the ground that the said statute is repugnant to the Constitution of the United States; this suit was instituted for the recovery of the amount thus paid.

If there is such a thing as a principle of law which is held *semper ubique et ab omnibus*, it is that the tax in question, exacted under the circumstances involved, is unconstitutional.

Robbins v. *Shelby County Taxing District*, 120 U. S. 489, and the long line of succeeding cases cited in the Statement as to Jurisdiction at p. 8.

ARGUMENT

I.

Only federal questions are involved and they are substantial.

The *only* issue involved in this suit is whether Section 121 (e) of Chapter 127 of the State of North Carolina Public Laws of 1937, as applied to the appellant, is repugnant to the Constitution of the United States.

That was the *only* issue raised by the appellant and the *sole* question decided by each of the State courts below, as appears from the following chronological statement:

1. The complaint and the amended complaint were expressly predicated solely upon the invalidity of the said statute as in contravention of provisions of the

Federal Constitution (Statement as to Jurisdiction, pp. 3, 4);

2. The answer denied the invalidity and unconstitutionality of the said statute (Statement as to Jurisdiction, p. 4);

3. The federal questions were the only questions raised and presented by the appellant on the trial of the action in the court of first instance (Statement as to Jurisdiction, p. 5);

4. The opening sentence of the prevailing opinion of the Supreme Court of the State of North Carolina expressly states that the *only* question raised by the appeal was whether the tax levied under the said statute was "invalid as violative of the Commerce Clause of the Constitution of the United States" (216 N. C. 114, 115; 3 S. E. [2d] 292, 293; Statement as to Jurisdiction, p. 24); and the final judgment was based *solely* upon the ground that the said statute did not violate the said clause of the Federal Constitution;

5. The decision of the said Court on reargument granted the appellant's petition to the extent that it showed that the said statute was challenged by the appellant as infringing both the Commerce Clause and Section 1 of the Fourteenth Amendment; and the opinion of three of the six Justices of the said Court who participated concurred in the allowance of the petition for reargument to that extent, and dissented from its dismissal in part on the ground that the said statute offended against the Constitution of the United States (217 N. C. 134, 6 S. E. [2d] 893; Statement as to Jurisdiction, pp. 32-34);

6. The Chief Justice of the said Court has, by certificate filed herein, certified that the questions sought to be argued by the appellant are substantial federal ques-

tions, that they were duly and properly raised, and that they are available for review by this Court upon appeal.[2]

It is manifest that the federal questions involved are substantial and of surpassing public importance, when we consider:

(a) That the courts of last resort of two sister States, viz., South Carolina and Louisiana, expressly repudiated the decision of the court below herein and held the corresponding and virtually identical statutes of those States repugnant to the Constitution of the United States (in suits to which appellant herein, or its representative was a party);

State v. *Yetter*, 192 S. C. 1, 5 S. E. (2d) 291 (Statement as to Jurisdiction, pp. 34-42);

State of Louisiana v. *Best & Co.*, —— La. —— 195 So. 356; rehearing denied April 1, 1940, —— La. ——, —— So. —— (Statement as to Jurisdiction, pp. 42-52);

(b) That the final judgment of the court below was by an evenly divided court on reargument;

(c) That the prevailing opinion of the court below cited no direct authority in support of its conclusion; and

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[2] The following is an excerpt from the certificate of the Chief Justice of the court below:

"That said Best & Company, Inc., duly and properly raised the following substantial federal questions which were considered and passed upon by the Supreme Court of the State of North Carolina, and are available for review by the Supreme Court of the United States upon appeal, to-wit:

(A) That said statute is repugnant to and infringes the commerce clause (Section 8 of Article I) of the Constitution of the United States.

(B) That said statute is repugnant to and infringes the equal protection and due process clauses (Section 1) of the Fourteenth Amendment to the Constitution of the United States."

(d) The certificate of the Chief Justice of the court below (see *supra*).[3]

In the case at bar there are presented only federal questions. We have discussed their substantial nature and their effect on public and private interests in the Statement as to Jurisdiction.

The matter presently before the Court is solely as to whether it should note probable jurisdiction. When, as here, all statutory requirements have been fully complied with, jurisdiction should not be denied, and an appeal should not be dismissed on motion for want of a substantial federal question, unless it appears that each question presented is so clearly lacking in merit that, upon mere citation of decisions of this Court, it may be put aside as not requiring further consideration.

Alton R. Co. v. *Illinois Comm'n.*, 305 U. S. 548, 550;
Hamilton v. *Regents*, 293 U. S. 245, 258;
California Water Service Co. v. *Redding*, 304 U. S. 252, 255;
Levering & G. Co. v. *Morrin*, 289 U. S. 103, 105;
Milheim v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716-717;
Chesebro v. *Los Angeles Co. Dist.*, 306 U. S. 459, 463.

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[3] Although the certificate of the Chief Justice of the State court cannot confer jurisdiction on this Court, it is entitled to great respect and serves to make more specific and certain the federal questions contained in the record. *Home for Incurables* v. *City of New York*, 187 U. S. 155, 158; *Louisville & Nashville R. R.* v. *Smith*, 204 U. S. 551, 561; *Honeyman* v. *Hanan*, 300 U. S. 14, 18-19; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477, 481.

II.

Where a federal question is involved this Court is not bound by the form a statute bears or how it is characterized by the State court, but it should determine the true nature of the tax by ascertaining its operation and effect.

(In Reply to Appellee's Point I.)

The appellee seeks to avoid a consideration of the appeal herein on its merits by invoking the familiar rule (here inapplicable) that the construction placed upon a State statute by the highest court of the State is binding upon the Supreme Court of the United States.

In so doing, the appellee ignores the equally familiar rule that this Court is in duty bound to determine the question raised under the Federal Constitution upon its own judgment of the actual operation and effect of the tax, irrespective of the label it bears, or the manner in which it is construed by the State court.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 294;
Schuylkill Trust Co. v. *Penna.*, 296 U. S. 113, 119;
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U. S. 249, 259;
Near v. *Minnesota*, 283 U. S. 697, 708;
Carpenter v. *Shaw*, 280 U. S. 363, 367;
Air-Way Corp. v. *Day*, 266 U. S. 71, 82;
International Paper Co. v. *Massachusetts*, 246 U. S. 135, 142;
Kansas City Ry. v. *Kansas*, 240 U. S. 227, 231;
Galveston, Harrisburg &c. Ry. Co. v. *Texas*, 210 U. S. 217, 227.

See also the following decisions relating specifically to fixed-sum license tax statutes:

Brennan v. *Titusville*, 153 U. S. 289, 299, 302;
Caldwell v. *North Carolina*, 187 U. S. 622, 624, 630-632;

Crenshaw v. *Arkansas*, 227 U. S. 389, 399-400;
Davis v. *Virginia*, 236 U. S. 697, 698-699.

The statute purports to impose a State license tax upon those who are not regular retail merchants in the State of North Carolina for the privilege of displaying samples in a hotel room, or temporarily occupied house, for the purpose of securing orders for the retail sale of goods, wares or merchandise so displayed, and provides that such license shall entitle such persons to display such samples, goods, wares or merchandise in any county in the State. The statute also authorizes counties, cities or towns to levy a license tax not in excess of the State license tax.

The court below held that the displaying of samples in temporary quarters was peculiarly a local and intrastate act, outside the realm of interstate commerce, and therefore that the tax as applied to the appellant did not infringe upon the Commerce Clause of the Federal Constitution. With this opinion one-half of the members of the court participating did not agree, and held the construction thus placed upon the statute to be "a forced one" which did not "save it from constitutional offence."

The appellee contends that the construction of the State statute by the highest court of the State precludes this Court from considering the federal questions, conceded in the prevailing opinion of the court below to be the only questions involved.

Reduced to its simplest terms, the gist of the appellee's argument is that no question is open to review by this Court, because the court below has decided that the statute in question does not impose an undue burden upon commerce between the States. If this contention were followed to its logical conclusion, no statute sustained as constitutional by a State court would ever be available for review by this Court.

The question whether a State law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon

how it is construed or characterized by the State court, but upon its practical operation and effect.

American Mfg. Co. v. St. Louis, 250 U. S. 459, 462-463.

In the attempt to distinguish the tax assessed against the appellant from those numerous fixed-sum privilege, license, and occupation taxes on the business of soliciting orders for the purchase of goods to be shipped interstate uniformly held unconstitutional by this Court, the prevailing opinion of the court below labeled the tax a "use" tax.

We have inserted a marginal footnote which we believe demonstrates that such label is inconsistent with the true nature of the tax and a misnomer.[4]

As this Court succinctly stated in *Wagner* v. *City of Covington*, 251 U. S. 95, at p. 102:

> "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; * * *."

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[4] The label "use" tax was applied notwithstanding that in the opening sentence of the same opinion the tax is referred to as "the State *tax upon the display of samples*, goods, etc."; and notwithstanding that elsewhere in the same opinion the following expressions are used: *"the commercial activity here taxed"*; "under this statute *the act taxed* must occur in North Carolina, and the room where the act transpires must be within the State"; *"the taxed activity* must be directed at the retail trade in North Carolina"; "although *such displaying by sample* may ultimately result in orders which will flow into interstate commerce, * * *"; *"the displaying of samples in temporary quarters, here taxed*, was peculiarly a local and intra-state act * * *."

The words "use tax" appear nowhere in the statute: the subsection of the statute under which the tax was levied denominates it as "an annual privilege tax", and specifies that a "license" shall be procured "for the privilege of displaying such samples, goods, wares or merchandise"; the article of the statute in which this section is included is captioned "License Taxes", and Section 100 provides that "Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, * * *."

The answer in this suit admits that the statute imposes a license tax, and that the sum sued for was collected as a license tax.

See also:

Macallen Co. v. *Massachusetts,* 279 U. S. 620, 626;
Lawrence v. *State Tax Comm.,* 286 U. S. 276, 280;
Educational Films Corp. v. *Ward,* 282 U. S. 379, 387.

Where the State court decides the question presented, not upon an independent State ground, but, deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment.

Indiana ex rel. Anderson v. *Brand,* 303 U. S. 95, 98.

The ruling below that the display of samples in a local hotel room constituted intrastate business in North Carolina does not foreclose this Court from considering and determining for itself whether the appellant's activities in that State actually constituted interstate commerce and whether the State law as applied to the appellant was repugnant to the Commerce Clause.

Kansas City Steel Co. v. *Arkansas,* 269 U. S. 148, 150;
Davis v. *Virginia, supra,* at pp. 698-699.

None of the authorities cited by the appellee derogates against the jurisdiction of this Court. Three of the decisions cited did not involve review of State court decisions, but arose in the federal courts. In all but one of the cases probable jurisdiction was noted and the federal questions involved were decided on the merits. None questions jurisdiction of this Court to determine upon its own judgment whether a State law or a tax imposed thereunder in its practical operation and effect deprives a party of rights secured by the Federal Constitution.

In three of the cases cited the Court held that a judgment by the highest court of a State as to the meaning and effect

of its own constitution is decisive and controlling everywhere (an issue not herein involved); but in each the federal questions involved were given consideration by this Court.

The only case cited by the appellee in which an appeal from a State court was dismissed was *Bacon & Sons* v. *Martin*, 305 U. S. 380, and the Court held therein that no substantial federal question was involved because the statute, as construed by the State court, had been applied in conformity with the principles declared in prior decisions of this Court.

In the case at bar an entirely different picture is presented. The court below, in construing the statute, failed and refused to apply the principle declared in *Robbins* v. *Shelby County Taxing District, supra,* and the long line of decisions following and approving it, and cited no direct authority in support of the conclusion reached.

Williams v. *Eggleston*, 170 U. S. 304, cited by the appellee, is direct authority in support of appellant's contention that this Court should note probable jurisdiction. In that case the motion to dismiss was overruled, on the ground that "it is not open to question that this court has jurisdiction" where sections of the Federal Constitution were specifically set up in the State courts and relied upon.

Since in this case substantial federal questions and only such questions are involved, and were properly raised, were necessary to the determination of the cause, and were actually decided, it is respectfully submitted that this Court should entertain jurisdiction and determine on the merits whether the operation and effect of the taxing statute, as applied to the appellant, is repugnant to the Constitution of the United States.

III.

There is involved the federal question of whether the taxing act, as construed, violates the Commerce Clause of the Federal Constitution.

(In Reply to Appellee's Point II.)

This, concededly, is the principal issue involved.[5]

A considerable portion of the Statement Opposing Jurisdiction is devoted to the argument that the taxing act does not violate the Commerce Clause, an issue which goes to the merits of the appeal but does not make against the jurisdiction of this Court.

The very discussion by the appellee of the issue as to whether or not the taxing act violates the Commerce Clause necessarily implies the presence of a federal question.

The statute herein, even as construed in the prevailing opinion in the court below, when applied to the appellant contravenes the Commerce Clause. The use of a local hotel room to display samples, concededly for the sole purpose of securing orders for the retail sale of goods to be delivered interstate, is not preliminary to or reparable from commerce itself, and is so closely woven into the interstate transaction as to be an integral part thereof.[6]

"A regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce."

Brennan v. *Titusville, supra,* at p. 298.

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[5] See the opening sentence of the prevailing opinion of the court below.

[6] This was the conclusion of the highest courts of the sister States of South Carolina and Louisiana in construing statutes in all pertinent and material respects identical in phraseology with the North Carolina statute as applied to the appellant or one of its employees. The South Carolina Court specifically declined to follow the decision of the North Carolina Supreme Court herein sought to be reviewed. Both opinions appear in the appendix to the Statement as to Jurisdiction (Exhibits D and E thereof).

"The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

Stockard v. *Morgan,* 185 U. S. 27, 36.

We respectfully submit that the distinction attempted to be made in the prevailing opinion of the court below is as transparent as was that attempted to be made by the Supreme Court of the same State and condemned by this Court in *Caldwell* v. *North Carolina, supra.*

Commerce among the States is a practical, not a technical, conception. From the point of view of commerce the entire transaction was one affair.

Davis v. *Virginia, supra.*

The statute casts its attendant burden only on those who are not regular retail merchants in the State of North Carolina. North Carolina retail merchants may conduct hotel displays to secure orders at any location in North Carolina without being subject to the tax, and local persons who are not merchants do not conduct hotel displays. The same hotel room may be occupied free of tax for any purpose by anyone other than an out-of-state retail solicitor. In its practical operation the burden of the tax is laid solely on extra-state merchants who attempt to sell their merchandise at retail through the channels of interstate commerce.

The tax is clearly an instrument of discrimination against interstate business. It appears to be aimed at suppressing or placing at a disadvantage the business of appellant and other extra-state merchants when brought into competition with intrastate merchants.

Fixed-sum license taxes aimed at such suppression were specifically condemned by this Court in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, which specifically approved the rule of *Robbins* v. *Shelby County Taxing District, supra.*

The appellee adverts to taxes which regular North Carolina retail merchants allegedly are required to pay. That argu-

ment is not pertinent to the question of jurisdiction, and we shall therefore defer consideration thereof.[7]

The appellee cites *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, as authority for the imposition of the tax here in question. That case involved a use tax, and the basis of the decision of this Court therein was that property transported in interstate commerce may be subject to property tax not discriminatory in operation, after it has become part of the common mass of property within the State of destination. In the case at bar no property tax whatsoever is involved and the use of the samples on display, which concededly did not become part of the common mass of property within the State, was, in the language of Mr. Justice Cardozo, "so closely connected with delivery as to be in substance a part thereof." A use tax is predicated upon the ownership of property and not, as here, on the temporary occupancy of a local hotel room.

The opinion in the later use tax case of *Southern Pac. Co.* v. *Gallagher*, 306 U. S. 167, which relied upon and followed the decision in the *Silas Mason* case, cites with approval *Robbins* v. *Shelby County Taxing District, supra*, and several of the other authorities relied upon by the appellant.

Western Live Stock v. *Bureau*, 303 U. S. 250, and *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, cited by the appellee, are readily distinguishable. The businesses therein taxed fell within the line of precedents authorizing a State to tax a purely local business which is separate and distinct from the transportation or intercourse which is interstate com-

[7] At this point, however, it might not be out of order to note that regular retail merchants of North Carolina, engaged in the same or a similar line of business as the appellant, are not subject to any fixed-sum license tax whatsoever for the privilege of engaging in such business in the State of North Carolina.

Under the statute counties and cities or towns are authorized to levy license taxes on the business taxed under the statute in an amount not in excess of the annual State license tax, and substantial sums have in fact been exacted from the appellant as local taxes under such enabling law. A regular North Carolina retail merchant who has his established place of business in another county is not subject to such local taxes.

merce. The former case was clearly distinguished on this ground in *McGoldrick* v. *Berwind-White Co., supra.*

In the concluding portion of the appellee's Point II there are cited several cases, none of which conflicts with the principle enunciated in *Robbins* v. *Shelby County Taxing District, supra,* and the other authorities relied upon by the appellant, as more fully appears from recent decisions of this Court in which both lines of authorities were cited with approval.

Gwin, etc., Inc. v. *Henneford,* 305 U. S. 434, at pp. 437, 438, 441;
McGoldrick v. *Berwind-White Co., supra.*

The appellee begs the very question of jurisdiction by arguing that the construction placed on the taxing act by the court below saves it from condemnation of the principle established by *Robbins* v. *Shelby County Taxing District, supra,* and the other cases cited at page 8 of the Statement as to Jurisdiction.

Whether the statute as construed and applied to the appellant exceeds the constitutional limitation is a substantial federal question. And on that question, it is respectfully submitted, the appellant is entitled to be heard on the merits.[8]

[8] Precedents abound for the noting of jurisdiction: cf. *Fisher's Blend Station* v. *Tax Com'n.,* 297 U. S. 650; *Crew Levick Co.* v. *Pennsylvania, supra.* See also *Western Live Stock* v. *Bureau, supra,* in which jurisdiction was noted notwithstanding that the decision on the merits sustained the State court.

IV.

There are also involved the federal questions of whether the appellant has been denied the equal protection of the laws and deprived of its property without due process of law.

(In Reply to Appellee's Point III.)

The substantial nature of these federal questions was set forth in the Statement as to Jurisdiction heretofore filed.

None of the arguments advanced by the appellee, and none of the cases cited by him, make against the jurisdiction of this Court; their bearing, if any, is upon the merits of the appeal.

In many of the cases cited by the appellee the State statute was held invalid as in conflict with the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. Such citations are not authority against the principles urged by the appellant.

In order, therefore, not to extend this brief to undue length, we are deferring further consideration of these federal questions.

V.

The motion to strike should be denied.

The complaint and the amended complaint allege, the answer admits, and the parties stipulated for the record that on February 9, 1938 the plaintiff-appellant paid to the defendant-appellee the sum of $250. pursuant to a demand made upon the appellant by the appellee under the section of the law, the validity of which is here involved, and that at the time of making such payment the appellant notified the appellee in writing that the said payment was made under protest.

The license which the appellee seeks by motion to strike from the record is that issued to the appellant by the appellee

as Commissioner of Revenue under the section of the law in question, and constitutes the receipt for the payment of tax aforesaid.

Section 182 of Chapter 127 of the State of North Carolina Public Laws of 1937 (Statement as to Jurisdiction, pp. 19-20) provides that the license tax levied under the said statute shall be paid to the Commissioner of Revenue who shall issue a license therefor.

To afford this Court the opportunity of seeing the license issued upon payment of the tax for the recovery of which this suit was instituted, with the form of which the court below was unquestionably familiar, the appellant requested, in its praecipe to the Clerk of the Supreme Court of the State of North Carolina, that a true copy of the license be included in the transcript of record herein.

The inclusion of such license in the record herein is solely for the information of this Court, and we respectfully submit that its inclusion is in no way prejudicial to the appellee, who, we should assume, would welcome the opportunity of having all pertinent and material facts before this Court.

CONCLUSION

Substantial federal questions are involved, fraught with both public and private consequences. It is, therefore, respectfully submitted that probable jurisdiction should be noted and the motion to dismiss should be denied.

It is further respectfully submitted that the motion to strike should be denied.

Dated, May 23, 1940.

Respectfully submitted,

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